Supreme Court, U.S.
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No. 99-1169 (S)

In The

Supreme Court of the United States

NEW PRIME d/b/a PRIME, INC.
and SUCCESS LEASING,

Petitioners,

vs.

OWNER OPERATORS INDEPENDENT DRIVERS
ASSOCIATION, INC., ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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8pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

Respondents' Arguments, If Anything, Support Petitioner's Point That the Eighth Circuit Has Created a Federal Private Right of Action Where None Exists 1

A. Respondents Fail to Explain The Statutory Language that the Eighth Circuit Acknowledged was Inconsistent 1

B. Respondents Fail to Meaningfully Distinguish the Cases Rejecting a Private Right of Action Under the Parallel Rail Provisions of the ICC Termination Act 2

C. Respondents' Reliance on the 1990 "Catch-All" Statute of Limitations is Misplaced 4

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Federal Cases

City of Laredo v. Texas Mexican Ry., 935 F. Supp. 895 (S.D. Tex. 1996) 2

DeBruce Grain, Inc. v. Union Pacific R.R., 983 F. Supp. 1280 (W.D. Mo. 1997), *aff'd on other grounds*, 149 F.3d 787 (8th Cir. 1998) 2, 4

Lane v. Ogden Entertainment, Inc., 13 F. Supp. 2d 1261 (M.D. Ala. 1998) 4

Renteria v. K & R Transportation, Inc., Case No. CV98-290MRP (C.D. Cal. February 23, 1999) 3, 4

Federal Statutes

28 U.S.C. § 1658 4

49 U.S.C. § 11704 3

49 U.S.C. § 11705 3

49 U.S.C. § 14704 3

49 U.S.C. § 14704(a) 4

49 U.S.C. § 14704(a)(1) 1, 2

49 U.S.C. § 14704(a)(2) 1

49 U.S.C. § 14705 ..... 3, 4

49 U.S.C. § 14705(e) 4

INTRODUCTION

Respondents' brief in opposition merely highlights the importance of this case. By acknowledging that OOIDA's approximately 47,000 members now have a private civil action for damages and injunctive relief for perceived violations of agency *regulations* (Resp. Br. 1), respondents unwittingly hint at the flood of federal litigation to come. And by failing to meaningfully distinguish cases interpreting the parallel rail carrier provisions of the ICC Termination Act, respondents effectively acknowledge that the confusion that exists in the lower courts is widespread.

ARGUMENT

Respondents' Arguments, If Anything, Support Petitioner's Point That the Eighth Circuit Has Created a Federal Private Right of Action Where None Exists.

A. Respondents Fail to Explain The Statutory Language that the Eighth Circuit Acknowledged was Inconsistent.

The Eighth Circuit confessed to being "rather mystified" by the "inconsistent language used in the Termination Act's various enforcement provisions." (Pet. App. 13a). Respondents' brief, and the Government's brief, are singularly unhelpful in addressing the statute's failings.

Contrary to respondents' argument, the second sentence of 49 U.S.C. § 14704(a)(1) does not become "mere surplusage" if no private right of action is inferred. That sentence, as well as the provisions of § 14704(a)(2),

instead make plain that a party granted a right to sue to "enforce an agency order" under § 14704(a)(1) may, as part of that same action, recover damages and injunctive relief in addition to enforcement. Respondents' suggestion that these provisions somehow authorize a suit to enforce *regulations*, when the statute (including the applicable limitations provisions) specifically refers only to *orders*, is not a supportable reading of the statute.

These provisions are causing confusion in the lower courts. The Court should consider whether the imprecise language in these provisions should be used to dramatically expand federal jurisdiction.

B. Respondents Fail to Meaningfully Distinguish the Cases Rejecting a Private Right of Action Under the Parallel Rail Provisions of the ICC Termination Act.

Respondents try to distinguish the two lower court cases[1] that appear to have interpreted the parallel rail provisions of the ICC Termination Act as foreclosing a private right of action to challenge agency regulations. Their distinction is simply that the Surface Transportation Board, which enforces the rail carrier provisions, has "exclusive" jurisdiction, while the FHWA, which enforces the motor carrier provisions, does not. This distinction is meaningless.

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[1] *DeBruce Grain, Inc. v. Union Pacific R.R.*, 983 F. Supp. 1280, 1284 (W.D. Mo. 1997), *aff'd on other grounds*, 149 F.3d 787 (8th Cir. 1998); *City of Laredo v. Texas Mexican Ry.*, 935 F. Supp. 895, 898 (S.D. Tex. 1996).

The question under both the ICC Termination Act rail provisions and the motor carrier provisions is whether Congress intended to create a private right of action for violations of agency regulations. The provisions addressing this question in both statutes are identical in all material respects. *Compare* 49 U.S.C. §§ 11704, 11705 *with* 49 U.S.C. §§ 14704, 14705.[2] The plain language of both statutes permits private suits only to enforce agency "orders," not "regulations." The fact that the Surface Transportation Board has exclusive jurisdiction, except as modified in the ICC Termination Act, has no bearing on this issue. Thus decisions interpreting the parallel rail provisions are directly relevant to the question of whether *any* agency regulations, be they those of the Surface Transportation Board or the FHWA, may be privately enforced under the ICC Termination Act without first obtaining an agency order.

The fact that, until this case was decided, every court to interpret the nearly identical ICC Termination Act rail provisions and motor carrier provisions concluded that these provisions permit private suits only to enforce agency "orders," not "regulations," shows that the confusion in the lower courts is more widespread than respondents or the Government acknowledge.

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[2] The court in *Renteria v. K&R Transportation, Inc.*, Case No. CV98-290MRP (C.D. Cal. February 23, 1999) (Pet. App. G 54a-66a), recognized that the motor carrier and rail carrier provisions are "identical in all material respects."

C. Respondents' Reliance on the 1990 "Catch-All" Statute of Limitations is Misplaced.

The ICC Termination Act sets out at least five different limitations periods in its motor carrier section. *See* 49 U.S.C. § 14705. These limitations periods expressly refer only to private actions to enforce agency "orders," not "regulations." *See* 49 U.S.C. § 14705(e). As two federal courts have expressly recognized, Congress's failure to enact a specific limitations period governing actions to enforce "regulations" serves to reinforce the plain language of the statute, which limits private rights of action to enforcement of "orders." *See DeBruce*, 483 F. Supp. at 1284; *Renteria v. K&R Transp. Co.*, Case No. CV98-290MRP (C.D. Cal. February 23, 1999) (Pet. App. G 54a-66a).

Respondents suggest that the "catch-all" limitations provision passed by Congress in 1990, five years before the ICC Termination Act, somehow changes this analysis. But 28 U.S.C. § 1658 only applies to statutes creating *new causes action* after December 1, 1990, not those that merely redefine existing causes of action like § 14704(a). *Lane v. Ogden Entertainment, Inc.*, 13 F. Supp. 2d 1261 (M.D. Ala. 1998). Further, simply because a general limitations statute exists to cover Congress's inadvertent omissions cannot mean that Congress, in the course of setting out five specific limitations periods in the ICC Termination Act, intended to authorize actions to enforce "regulations" when it only mentioned "orders." As the Eighth Circuit acknowledged, the distinction between orders and regulations is a real one in this case, and one that the agency has conceded. (Pet. App. 11a n.2). The conspicuous absence of a limitations period covering actions to

enforce agency "regulations" from the ICC Termination Act, coupled with the express language in the statute limiting private enforcement actions to those seeking enforcement of "orders," shows conclusively that the Eighth Circuit has unwisely expanded federal jurisdiction beyond the clear language of the statute.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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